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Upstaging the Playwright: The Joing Authorship Entanglement between Dramaturgs and Playwrights

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UPSTAGING THE PLAYWRIGHT: THE JOINT AUTHORSHIP ENTANGLEMENT BETWEEN DRAMATURGS AND PLAYWRIGHTS*

I. INTRODUCTION

Jonathan Larson's musical *Rent* has been an astounding critical, artistic, and commercial success since its Broadway debut in 1996.[1] *Rent*, a modern version of the classic *La Boheme*, depicts New York Bohemians struggling with AIDS.[2] In addition to Larson's contribution as the playwright, several collaborators helped to develop the musical.[3] These collaborators included the artistic director of the New York Theater Workshop[4] ("NYTW"), the show's director, and Lynn Thomson, the dramaturg.[5]

During the musical's debut, Thomson filed a lawsuit against the playwright, Larson.[6] Thomson claimed that she was a joint author of *Rent*, and was therefore entitled to sixteen percent of the royalties, which is an estimated annual sum of $250,000.[7] Shining a rare spotlight on the dramaturg, this suit presented the Second Circuit with the novel issue of whether a dramaturg can rely on copyright law to claim a share of a play's royalties.[8]

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1. Greg Evans, *Judge Takes Larson Side in 'Rent' Suit*, DAILY VARIETY, July 24, 1997, at 1. *Rent* has routinely grossed more than $500,000 a week since its opening. *Id.* at 11. Winning four Tony awards and the Pulitzer Prize, *Rent* has become a critical success. *Prime Time Live: One Song Glory - Jonathan Larson Death* (ABC television broadcast, July 10, 1996) (transcript on file with the *Loyola of Los Angeles Entertainment Law Journal*) [hereinafter *Prime Time Live*].

2. *Prime Time Live*, *supra* note 1.

3. Thomson v. Larson, 147 F.3d 195, 197–98 (2d Cir. 1998). After the show's final dress rehearsal before the off-Broadway opening, Larson died of an aortic aneurysm. *Id.*

4. Before its Broadway production, *Rent* was produced as an off-Broadway production by the New York Theater Workshop. *Thomson*, 147 F.3d at 197.

5. One who specializes in the "art or technique of dramatic composition." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 381 (9th ed. 1988). *See infra* Part II.A.

6. Greg Evans, *Court Evicts Lawsuit Over 'Rent' Control*, DAILY VARIETY, July 28–Aug. 3, 1997, at 63.

7. *Id.* Thomson was paid $2,000 in 1995 for her dramaturgical services. *Lawsuit Dismissed for 'Rent' Royalties*, THE LEGAL INTELLIGENCER, July 25, 1997, at 4. Currently, she receives fifty dollars a week through an agreement with the show's Broadway producers. Patti Hartigan, *Wolfsong's Tales of His Journey Home*, BOSTON GLOBE, Dec. 6, 1996, at C7.

8. Robert Simonson *'Rent' Dramaturg Sues Larson Estate*, BACKSTAGE, Dec. 6, 1996, at 1;

Ruling in favor of the Larson estate, the court deemed the playwright sole author of *Rent*.[9] This decision not only raised legal questions regarding theatrical collaboration,[10] but thrust the theater world into a divisive debate over the dramaturg's role in theater.[11]

This Comment examines why a dramaturg cannot be deemed a joint author of a play under prevailing copyright law. Part II explores the dramaturg's role in theater and common law treatment of joint works under the 1909 Copyright Act.[12] Additionally, Part II focuses on the definition of "joint works" under the current 1976 Copyright Act.[13] Part III establishes the current approach to identify joint authors and discusses case law that applies this test. This Part also assesses why the Second Circuit in *Thomson v. Larson* correctly applied the prevailing joint authorship test. Finally, Part IV scrutinizes the shortcomings of this test and establishes that contract law is better suited than copyright law to protect the dramaturg, especially in the realm of new play development.

II. BACKGROUND

A. The Dramaturg's Emergence in American Theater

Although the dramaturg originated in eighteenth century Germany,[14] it did not become a visible force in American theater until fifteen years ago.[15] The dramaturg's role in American theater is amorphous[16] and overlaps with that of other artists.[17] A consensus has never been reached on the dramaturg's function in theater.[18] Typically, dramaturgs assist directors and

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see Evans, *supra* note 1, at 1.

9. *Lawsuit Dismissed for 'Rent' Royalties*, *supra* note 7, at 4.

10. Ralph Blumenthal, *Memory Falters in Lawsuit for 'Rent' Royalties*, N.Y. TIMES, July 23, 1997, at B2.

11. Evans, *supra* note 6, at 61.

12. 35 Stat. 1075 (repealed 1978).

13. 17 U.S.C § 101 (1994).

14. Telephone Interview with Mandy Mishelle, Literary Manager, New York Theater Workshop, New York, N.Y. (Sept. 12, 1997); *see also* Hartigan, *supra* note 7, at C7 (stating that the first recognized dramaturg was Gotthold Ephraim Lessing, a German playwright who the Hamburg National Theater hired in 1767 to write essays for the theater's productions).

15. Simonson, *supra* note 8, at 1.

16. Nelson Pressley, *Dramaturg's Legal Lament about 'Rent'*, WASH. TIMES, Aug. 24, 1997, at D2.

17. Jan Stuart, *On Theater: Who Do Ya Call if Turgenev Gets Turgid?*, NEWSDAY, Aug. 3, 1997, at C16.

18. Pressley, *supra* note 16, at D2.

playwrights.[19] As a director's aid, a dramaturg contributes research and writes the descriptive essays for the show's program.[20] For example, if a play is set in a particular nation or certain period of history, the dramaturg's job involves checking pronunciations and period authenticity.[21] In this respect, the dramaturg's duties overlap with those of the director, set designer, and speech consultant.[22] As a playwright's assistant, the dramaturg offers script suggestions to strengthen the story, characters, and theme.[23] This assistance is similar to editing and can even include rewriting scenes or dialogue.[24]

The dramaturg's emergence in American theater correlated with the rise of regional theater, which focused on developing and creating new plays.[25] The more collaborative this process became, the more likely each collaborator's voice was heard, including the dramaturg's.[26] After stabilizing and becoming entirely professional, regional theaters introduced American theater to areas outside New York.[27] These off-off Broadway companies conducted developmental workshops to create original plays.[28] During the 1960s, the Open Theater, a well-known off-off Broadway company, encouraged playwrights to supply outlines of scenes to actors who later developed the dialogue through improvisation.[29] Today, many theaters have

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19. *Id.*

20. *Id.*

21. Stuart, *supra* note 17, at C16.

22. *Id.*

23. Pressley, *supra* note 16, at D2.

24. Stuart, *supra* note 17, at C16.

25. *See* Simonson, *supra* note 8, at 1.

26. Telephone Interview with Mandy Mishelle, *supra* note 14 (stating that theater has included an element of collaboration for several centuries). In the sixteenth century, theaters in Italy developed an art form called *commedia dell'arte* which became popular throughout Europe. *See* OSCAR G. BROCKETT, HISTORY OF THEATRE 147 (6th ed. 1991). Traveling troupes of actors performed *commedia dell'arte*, light-hearted stories often involving physical comedy. *See id.* Improvisation is a fundamental characteristic of *commedia dell'arte*, requiring the actors to work only from a plot outline instead of a finished script. *Id.* at 148. Thus, collaboration or ensemble acting was essential to this art form because no one actor could be sure what the others would say or do. *Id. Commedia dell'arte* has influenced the development of American theater as well. *See id.*

27. BROCKETT, *supra* note 26, at 574. In the 1940s, high production costs and the rising popularity of television resulted in the development of only a small number of Broadway productions. *Id.* at 571. In response, the off-Broadway movement burgeoned and inspired productions requiring lower production costs. *See id.* These economic pressures subsided by the 1960s, allowing off-Broadway theaters to produce more conventional shows. *Id.* at 573. Consequently, off-off Broadway productions became more experimental and efforts to decentralize theater grew. *Id.* at 573–74.

28. BROCKETT, *supra* note 26, at 622–23.

29. *Id.* at 623.

similar workshop programs where new plays are developed through the combined efforts of playwrights, actors, directors, and dramaturgs.[30] American theater continues to embrace the communal spirit.[31] There are many more "midwives in the birth of a play" than there were twenty years ago when the musical *A Chorus Line* was conceived through collaborative efforts.[32]

B. The Constitutional Purpose of Copyright Law

The United States Constitution provides that Congress shall have power . . . "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[33] In accordance with the Constitution, the general purpose of copyright legislation is to encourage learning.[34] Granting limited exclusive rights to authors is a means of achieving this goal.[35]

C. The History of Joint Works: The 1909 Copyright Act

The 1909 Copyright Act does not expressly refer to joint works or joint authorship.[36] Hence, case law has established the joint works principle.[37] In *Levy v. Rutley*,[38] a joint work was first defined as "a joint laboring in furtherance of a common design."[39] This definition was broadly applied in sub-

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30. Telephone Interview with Mandy Mishelle, *supra* note 14.

31. Stuart, *supra* note 17, at C16.

32. *Id.* In *A Chorus Line*, the cast of thirty-seven dancers gave testimonials that provided the basis for the show's story. *Id.* Because the cast contributed significantly to the musical's development, the playwright agreed to give the cast one-half of one percent of *A Chorus Line*'s gross profits as well as a portion of the subsidiary income. *Id.*

33. U.S. CONST. art. I, § 8, cl. 8.

34. *See* U.S. CONST. art. I, § 8, cl. 8 (providing that the goal of copyright legislation is to encourage the creation of works for the public by promoting the "Progress of Science and useful Arts"); *see also* Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069 (7th Cir. 1994) (stating that the objective of the Act is "not to reward an author for her labors, but 'to promote the Progress of Science and useful Arts'").

35. ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 15 (4th ed. 1993). A legislative report on the Copyright Act stated that the enactment of copyright legislation was not based upon any natural right an author has in her writings but rather focused on protecting the public's welfare. *See* H.R. REP. NO. 60-2222, at 1 (1909).

36. 1 MELVILLE B. NIMMER & DAVID NIMMER ON COPYRIGHT, § 6.01, at 6-3 n.1 (1998).

37. *Id.* § 6.01, at 6-3 n.1. The 1909 Copyright Act implicitly acknowledges that a copyright renewal can be jointly owned by more than one person, such as the author's children, executors, or next of kin. Copyright Act of 1909, § 24, 35 Stat. 1075, 1080–81 (repealed 1978).

38. 6 L.R.-C.P. 523, 529 (Eng. 1871).

39. *Id.* at 529; *see also* Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d

sequent federal cases involving copyright protection under the 1909 Act.[40] In the time period between the enactment of the 1909 and 1976 Acts, cases generally involved conflicts between composers and lyricists.[41]

At common law, a joint work was found even when two authors did not work together, did not make their contributions during the same period, and did not know each other.[42] The Second Circuit in *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*[43] supports this broad interpretation of joint works.[44] The *Marks* court held that for a joint work to exist, "it makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such."[45] In *Marks*, a lyricist wrote the original words for unwritten music.[46] The lyricist's publisher subsequently employed a composer to write the music.[47] The court determined that the resulting song was a joint work because the lyricist intended his words to be set to music.[48] Likewise, the composer understood that he was composing for particular lyrics.[49]

Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.,[50] also known as the *Melancholy Baby* case,[51] extended the holding from *Marks*.[52] In the *Melancholy Baby* case, a composer created the music and his wife wrote the lyrics.[53] Because the publisher only sought to use the composer's music, he obtained the composer's consent to hire a new lyricist.[54] Therefore, the Sec-

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266, 267 (2d Cir. 1944), *modified*, 140 F.2d 268 (quoting *Levy*, 6 L.R.-C.P. at 529 (establishing one of the first common law definitions of joint authorship)).

40. *See* Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569 (2d Cir. 1955), *modified on reh'g*, 223 F.2d 252 (2d Cir. 1955); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946); *Edward B. Marks Music Corp.*, 140 F.2d at 267; Maurel v. Smith, 220 F. 195 (S.D.N.Y. 1915), *aff'd*, 271 F. 211 (2d Cir. 1921).

41. Susan Keller, *Collaboration in Theater: Problems and Copyright Solutions*, 33 U.C.L.A. L. REV. 891, 895 (1986); *see also Maurel*, 220 F. at 203 (holding that the composer and lyricist working on the opera book were joint authors).

42. 1 NIMMER & NIMMER, *supra* note 36, § 6.03, at 6-7.

43. 140 F.2d at 266 (2d. Cir. 1944), *modified* 140 F.2d 268 (2d. Cir. 1944).

44. *Edward B. Marks Music Corp.*, 140 F.2d at 267; *see also* 1 NIMMER & NIMMER, *supra* note 37, § 6.03, at 6-7.

45. *Edward B. Marks Music Corp.*, 140 F.2d at 267.

46. *Id.* at 266.

47. *Id.*

48. *Id.* at 267.

49. *Id.*

50. 161 F.2d 406 (2d Cir. 1946).

51. *See* 1 NIMMER & NIMMER, *supra* note 36, § 6.03, at 6-8.

52. *Id.*

53. *Shapiro, Bernstein & Co.*, 161 F.2d at 407.

54. *Id.* at 408.

ond Circuit held that the composer of the music and the second lyricist were joint authors of the resulting song.[55] The *Melancholy Baby* case is significant because it held that a person chosen to re-write a song's original lyrics can be deemed a joint author with the original composer.[56]

The Second Circuit went even further in *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*,[57] known as the *Twelfth Street Rag* case.[58] In this case, the composer created a popular piano solo, which he did not intend to be accompanied by lyrics.[59] The composer later assigned his rights in the composition to a publisher, who then hired a lyricist.[60] The court deemed the resulting piece to be a joint work of the lyricist and composer.[61] Thus, this case radically extended the joint work doctrine in two ways.[62] First, the court held that the requisite intent could be established by the author's assignee instead of the author.[63] Second, it held that intent can be subsequently established by the author or their assignee, regardless of the author's original opposite intent.[64]

D. Joint Works under the 1976 Copyright Act

1. Rejecting the *Twelfth Street Rag* Doctrine

By enacting the Copyright Act of 1976, Congress created a narrower definition of joint works, and rejected the application of the *Twelfth Street Rag* doctrine to works created on or after January 1, 1978.[65] Under the 1976 Act, in order to be considered a joint work, authors must intend for

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55. *Id.* at 409.

56. *Id.*

57. 221 F.2d 569 (2d Cir. 1955), *modified on reh'g*, 223 F.2d 252 (2d Cir. 1955).

58. 1 NIMMER & NIMMER, *supra* note 36, § 6.03, at 6-9.

59. *Shapiro, Bernstein & Co.*, 221 F.2d at 570.

60. *Id.*

61. *Id.*

62. 1 NIMMER & NIMMER, *supra* note 36, § 6.03, at 6-9.

63. *Id.*

64. *Id.* Before the enactment of the 1976 Copyright Act, a case known as the *Three Little Pigs* modified the *Twelfth Street Rag* Doctrine. *See* Picture Music, Inc. v. Bourne, Inc., 314 F. Supp. 640 (S.D.N.Y. 1970), *aff'd on other grounds*, 457 F.2d 1213 (2d Cir. 1972); 1 NIMMER & NIMMER, *supra* note 36, § 6.03, at 6-9. Faced with a conflict similar to the one presented in the *Twelfth Street Rag* case, the court in the *Three Little Pigs* did not find joint authorship because the songwriters did not make a "more substantial and significant contribution" to the original work. *Picture Music, Inc.*, 314 F. Supp. at 647.

65. 1 NIMMER & NIMMER, *supra* note 36, § 6.06[A], at 6-17 n.3. The 1976 Act became effective on January 1, 1978. Copyright Act of 1976, 17 U.S.C. § 301(a) (Supp. 1996). Thus, the 1909 Act still governs works created through December 31, 1977. *See id.*

their contributions to merge into a common whole.[66] The legislative history of the 1976 Act also emphasizes how essential the authors' intent is to the creation of a joint work.[67] By requiring that a contribution be made with such knowledge and intent, the legislative history rejected the *Twelfth Street Rag* doctrine which recognized a joint work even if an author did not have the intent to create one.[68]

In accordance with the legislative history of the 1976 Act, composers who hope to set lyrics to their music do not have the requisite intent to establish a joint work with the eventual lyricist.[69] This is because the composers do not know if lyrics will in fact be written for their music.[70] Similarly, playwrights are not deemed co-authors of a motion picture that is based on their work, unless they collaborated with the studio or screenwriter when they wrote the play.[71]

Although the legislative history of the 1976 Act expressly abandoned the *Twelfth Street Rag* doctrine, it has not expressly rejected the *Melancholy Baby* case.[72] Nevertheless, the legislative history provides that co-authors are required to intend *at the time the work is created* that their respective

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66. *See* 17 U.S.C. § 101 (1994). A joint work is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *Id.*; *see also infra* Part II.D.2 (defining joint work).

67. S. REP. NO. 94-473, at 103 (1975). "The touchstone here is *intention at the time the writing is done*, that the parts be absorbed or combined into an integrated unit." *Id.* (emphasis added); *see also* GORMAN & GINSBURG, *supra* note 35, at 280.

68. *See* H.R. REP. NO. 94-1476, at 120 (1976); GORMAN & GINSBURG, *supra* note 35, at 280.

69. *See* GORMAN & GINSBURG, *supra* note 35, at 281.

70. H.R. REP. NO. 94-1476, at 120; *see* GORMAN & GINSBURG, *supra* note 35, at 281.

71. H.R. REP. NO. 94-1476, at 120 (stating that "although a novelist, playwright, or songwriter may write a work with the hope . . . that [their] work will be used in a motion picture, this is clearly a case of separate or independent authorship rather than one where the basic intention behind the writing of the work was for motion picture use."); *see also* GORMAN & GINSBURG, *supra* note 35, at 280. It is unclear which joint works rule applies to works created before January 1, 1978. *See* COPYRIGHT LAW REVISION, PT. 1, REPORT OF THE REGISTRAR OF COPYRIGHT ON THE GENERAL REVISION OF U.S. COPYRIGHT LAW, 87TH CONG., 1st Sess. at 90. (1961) [hereinafter COPYRIGHT LAW REVISION]; 1 NIMMER & NIMMER, *supra* note 36, § 6.06, at 6-17 n.3. However, potential constitutional problems preclude the 1976 Act from being applied retroactively. *See* GORMAN & GINSBURG, *supra* note 35, at 271. To illustrate, under the *Twelfth Street Rag* Doctrine, if a composer writes a song without intending to set it to lyrics, a joint work is still created if a lyricist later writes lyrics for that song. *See* Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569, 570 (2d. Cir. 1955), *modified* on *reh'g*, 223 F.2d 252 (2d. Cir. 1955). If the 1976 Act were applied retroactively, each artist would only own their respective contribution rather than owning an equal and undivided interest in the whole song. This scenario could raise constitutional issues if the taking occurred without just compensation. GORMAN & GINSBURG, *supra* note 35, at 271.

72. *See* 1 NIMMER & NIMMER, *supra* note 36, § 6.03, at 6-8.

contributions be merged.[73] In the *Melancholy Baby* case, when the composer first wrote the music, he did not intend for his composition to accompany lyrics written by a second lyricist.[74] Therefore, the holding in the *Melancholy Baby* case is not compatible with the legislative history of the 1976 Act.

2. Defining *Joint Work*

The 1976 Copyright Act defines a "joint work" as "a work prepared by two or more authors[75] with the intention that their contributions be merged into inseparable[76] or interdependent[77] parts of a unitary whole."[78]

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73. H.R. REP. NO. 94-1476, at 120 (stating that the "touchstone . . . is the intention, at the time the writing is done.").

74. *See* Shapiro, Bernstein, & Co. v. Jerry Vogel Music Co., 161 F.2d 406, 410 (2d Cir. 1946). *But see* COPYRIGHT LAW REVISION, *supra* note 71, at 90 (indicating that The Register of Copyright "would not go as far as the theory of the *Twelfth Street Rag* decision, but would adopt the test laid down by the earlier line of cases.").

75. The 1976 Copyright Act states that "copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1994). Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. *Id.* The Act intentionally did not define "original works of authorship." H.R. REP. NO. 94-1476, at 51. Instead, the Act incorporated the standard established by the courts interpreting the 1909 Act. *Id.* at 51–52. The Supreme Court has defined "author" as "he to whom anything owes its origin" in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884), and as "the party who actually creates the work" in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989). Subsequent case law has indicated that an original work of authorship requires an "extremely low" level of creativity. *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (stating that "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity."); *see also* 1 NIMMER & NIMMER, *supra* note 36, § 1.08 [C][1] at 1-66.28 (explaining that "originality does not signify novelty"). As long as the work is created independently, neither novelty nor aesthetic merit are required to establish originality. H.R. REP. NO. 94–1476, at 51.

76. A part is inseparable if it is absorbed or combined into an integrated unit, although the part has little meaning standing alone. Childress v. Taylor, 945 F.2d 500, 505 (2d Cir. 1991); *see also* H.R. REP. NO. 94-1476, at 120. For example, the chapters of a novel or colors in a painting have little meaning when standing alone, but are inseparable when absorbed or combined into an integrated unit. *Id.*

77. A part is interdependent when the portion has meaning standing alone but achieves its significance because of the combination of those interdependent parts. *Childress*, 945 F.2d at 505. The lyrics and music of a song for example, are interdependent parts of a unitary whole. H.R. REP. NO. 94-1476, at 120; *see also Childress*, 945 F.2d at 505.

78. The legislative history provides examples of works constituting interdependent and inseparable parts of a unitary whole, however, these works are not expressly defined. *See* H.R. REP. NO. 94-1476, at 120.

This definition of a joint work also implicitly defines joint authorship.[79] However, the concept of a joint work is broader than that of joint authorship because not all joint works are necessarily products of joint authorship.[80] The 1976 Act also requires that "authors of a joint work [be] co-owners of copyright in the work."[81] Thus, joint owners of a work hold equal and undivided interests in that work.[82] Each joint author has the right to use or license the work as long as they please, as long as they share the profits with the other joint authors.[83]

3. The Ambiguous Meaning of Intent

The legislative history of the 1976 Copyright Act mentions that "a work is 'joint' if the authors collaborated with each other, or if each of the authors prepared their contribution with the knowledge and inten[t]ion that it would be merged with the contributions of other authors as 'inseparable or interdependent parts of a unitary whole.'"[84] This passage implies that either the act of collaboration alone, or the authors' knowledge and intent to merge their contributions will create a joint work.[85]

The 1976 Act's legislative history is inconsistent with its plain language because the legislative history allows a joint work to result from the authors' mere collaboration rather than an intent to merge their contributions.[86] In fact, the statute states that joint authors must create their work while knowing that it will be merged into a whole.[87] The "collaboration

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79. *Childress*, 945 F.2d at 505; 1 NIMMER & NIMMER, *supra* note 36, § 6.01, at 6-3.

80. 1 NIMMER & NIMMER, *supra* note 36, § 6.01, at 6-3. As Nimmer explains:

> A joint work will result under . . . the following circumstances: (1) if the work is a product of joint authorship; (2) if the author or copyright proprietor transfers such copyright to more than one person; (3) if the author or copyright proprietor transfers an undivided interest in such copyright to one or more persons, reserving to himself an undivided interest; (4) if upon the death of the author or copyright proprietor, such copyright passes by will or intestacy to more than one person; (5) if the renewal rights under the Copyright Act or the terminated rights under the termination of transfer provisions, vest in a class consisting of more than one person; [and] (6) if the work is subject to state community property laws.

Id. at 6-3, 6-4.

81. Copyright Act of 1976, 17 U.S.C. § 201(a) (1994); *see also* Childress, 945 F.2d at 505.

82. *See generally Childress*, 945 F.2d at 505; 17 U.S.C. §201 (providing details of what constitutes an undivided interest).

83. *See* 17 U.S.C. § 201(a) (1994).

84. S. REP. NO. 94-473, at 103 (1975).

85. Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1068 (7th Cir. 1994); *Childress*, 945 F.2d at 505.

86. *Erickson*, 13 F.3d at 1068.

87. *See* Copyright Act of 1976, 17 U.S.C. § 101 (1994) (describing a joint work as a "work prepared by two or more authors with the intention that their contributions be merged").

alone" standard implied by the legislative history discourages an author from writing because mere editorial comments by third parties could divest the author of sole authorship.[88] Authors will avoid such collaboration because it can result in joint authorship and, thus, authors will have a reduced incentive to create.[89] This standard for joint authorship frustrates the goal of the Constitution's copyright clause.[90]

4. Joint Works v. Derivative and Collective Works

It is important to distinguish joint works from derivative[91] and collective works.[92] A derivative work consists of inseparable parts, but does not require the authors to intend to create a joint work.[93] For example, a derivative work is created when an author's contribution results in the adaptation or transformation of another author's original work, such as a sequel to a film.[94] A collective work is similar to a derivative work in that the authors lack an intent to create a joint work.[95] The main difference between the two is that a collective work contains interdependent parts assembling several different authors' works into a collective whole,[96] such as an anthology or encyclopedia.[97]

Distinguishing a joint work from a collective or derivative work is essential because this distinction determines the rights an author will acquire. Authors of derivative and collective works own only their respective contributions.[98] In contrast, authors of a joint work own an equal and undivided interest in the entire work.[99] For example, if a song is a collective work and a composer licenses the musical portion of that song, the lyricist cannot obtain a share of the composer's income from the license agreement.[100] How-

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88. *Erickson*, 13 F.3d at 1069.

89. *Id.*

90. *Id.*; *see also* U.S. CONST. art. I, § 8, cl. 8; *supra* Part II.B.

91. A derivative work is a "work based upon one or more preexisting works, such as a translation, [or] musical arrangement." Copyright Act of 1976, 17 U.S.C. § 101 (1994).

92. A collective work is a "work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." Copyright Act of 1976, 17 U.S.C. § 101 (1994).

93. 1 NIMMER & NIMMER, *supra* note 36, § 6.05, at 6-13.

94. 17 U.S.C. § 101.

95. 1 NIMMER & NIMMER, *supra* note 36, § 6.05, at 6-13.

96. *Id.*; *see also* 17 U.S.C. § 101.

97. 17 U.S.C. § 101.

98. *See id.* § 103(b).

99. *See* Childress v. Taylor, 945 F.2d 500, 505 (2d Cir. 1991); 17 U.S.C. § 201(a).

100. *See generally* 17 U.S.C. § 103(b) (stating that "[t]he copyright in a compilation or derivative work extends only to the material contributed by the author of such work....").

ever, if the song is a joint work, then the composer must share the proceeds from that license with the lyricist who is co-owner of the copyright in that song.[101]

III. CASELAW SHINES A SPOTLIGHT ON COLLABORATORS IN THEATER

A. Two Approaches to Evaluating the Contributions of Joint Authors

The 1976 Act mandates that only fixed[102] works of original authorship are copyrightable.[103] To identify joint works that meet this statutory requirement, courts are split in evaluating the contributions of authors claiming joint authorship status.[104] The majority approach requires that the individual contribution of each joint author be copyrightable.[105] Professor Paul Goldstein, a well-respected copyright scholar,[106] supports the majority view.[107] On the other hand, the minority approach only requires that the combined result of the joint efforts be copyrightable.[108] This proposition is supported by Professor Melville Nimmer,[109] another well-respected copyright scholar.[110]

1. The Nimmer Approach

Nimmer interprets the 1976 Act to require only that each contribution "be more than de minimis" or that "more than a word or a line . . . be added

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101. *See generally id.* § 201(a) (1994) (stating that "[t]he authors of a joint work are coowners of copyright in the work").

102. A work is "'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than a transitory duration." *Id.* § 101.

103. *Id.* § 102(a).

104. Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1069 (7th Cir. 1994); Childress v. Taylor, 945 F.2d 500, 506 (2d Cir. 1991).

105. *See Erickson*, 13 F.3d at 1069; *Childress*, 945 F.2d at 506.

106. Paul Goldstein is an author of a well-respected copyright treatise. *See* Russ VerSteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1326 (1996).

107. PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW & PRACTICE, § 4.2.1.2 (1994); *see Childress*, 945 F.2d at 506.

108. *See Erickson*, 13 F.3d at 1069; *Childress*, 945 F.2d at 506.

109. 1 NIMMER & NIMMER, *supra* note 36, § 6.07, at 6-23; *see also Childress*, 945 F.2d at 506.

110. Nimmer, the late copyright scholar, also wrote a well-respected copyright treatise and was a professor of law at the University of California at Los Angeles. VerSteeg, *supra* note 106, at 1333.

by one who claims to be a joint author."[111] Under this approach, if authors *A* and *B* collaborate to write a book, where *A* contributes plot ideas and *B* incorporates those ideas into a completed literary expression, *A* and *B* would be joint authors of the work.[112]

Nimmer's proposition is problematic in two respects. First, it violates the spirit of the Constitution's copyright clause which encourages the creation of works for the benefit of the public.[113] Because this view does not mandate that each individual contribution be an original work of authorship or otherwise copyrightable, an individual author need only provide more than a de minimis contribution to be considered a joint author.[114] Consequently, an author can contribute something that is not copyrightable, such as an idea or concept,[115] and still be considered a joint author of a copyrightable work. For instance, suppose author *A* suggests creating a comedic sidekick who imparts dating advice to her best friend, the lead female character. If author *B* successfully incorporates that idea into a completed romantic comedy, author *A* is considered a joint author of the story. An author who contributes copyrightable material would be loath to share authorship status with one who does not contribute copyrightable material. Therefore, this approach chills the creative process because authors will hesitate to ask for assistance in developing their projects.[116] The result will be a decrease in the production of creative works. This ultimately disadvantages the public, and thwarts the fundamental purpose behind the Copyright Clause.

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111. 1 NIMMER & NIMMER, *supra* note 36, § 6.07, at 6-23.

112. *Id.*

113. *See* U.S. CONST. art. I, § 8, cl. 8; *Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights, and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong. 210–11 (1989) (statement of Ralph Oman) [hereinafter *Hearings*]; *see also supra* Part II.B. (stating the purpose of copyright law).

114. In fact, Nimmer acknowledged that the "standard of de minimis is not necessarily the same as the standard for copyrightability." 1 NIMMER & NIMMER, *supra* note 36, § 6.07, at 6-23.

115. The Act does not extend copyright protection to ideas, concepts, or discoveries. Copyright Act of 1976, 17 U.S.C. § 102(b) (1994). The Act and the legislative history distinguish between ideas, which are not copyrightable, and the expression of ideas, which are copyrightable. *See id.* § 102(b); H.R. REP. NO. 94-1476, at 56–57 (1976). For example, the theory that the Hindenburgh was deliberately sabotaged by a member of its crew to embarrass the Nazi regime is not copyrightable. *See* A.A. Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980). In contrast, the way this theory is told, organized, and expressed in a historical book is copyrightable. *See generally*, Baker v. Selden, 101 U.S. 99, 100 (1879) (holding that only the portion of the plaintiff's book explaining the accounting system could secure copyright protection, but the plaintiff could not prevent others from using a chart similar to his in implementing this system); Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678 (1st Cir. 1967) (providing that "copyright attaches to [the] form of expression").

116. Erickson v. Trinity Theater, Inc., 13 F.3d 1061, 1070 (7th Cir. 1994); *see also supra* Part II.D.3 and *infra* Parts III.B.1.b and IV.A.2 (explaining that the mere collaboration standard can chill the creative process).

The second shortcoming of Nimmer's approach is the ambiguity of his more than de minimis standard.[117] Nimmer provides little guidance as to when a contribution rises to the level of joint authorship, except that the contribution must be more than a word or line.[118] This ambiguity could result in inconsistent case law, as courts will have dissimilar interpretations of what constitutes "more than a word or line." Artists will resist collaboration because of difficulties in predicting how joint authorship claims will be resolved. Ultimately, the combined goal of the Copyright Clause and the Copyright Act will be frustrated.

2. The Goldstein Approach

The majority of courts and the Register of Copyright[119] support Goldstein's view that requires each contribution to be independently copyrightable.[120] Given the uncertainty of the Nimmer approach, Goldstein's view is more persuasive. Specifically, by requiring copyrightable contributions from all putative authors, the Goldstein approach prevents frivolous claims by those seeking to share the profits of a work created by a sole author.[121] In addition, this prevailing view finds an appropriate balance between copyright and contract law.[122] In the absence of a contract providing otherwise, copyright vests in only those authors who created the copyrightable contributions.[123] A person with non-copyrightable material who collaborates with a copyright owner can agree to contribute their material for an assignment of part ownership in the copyright.[124] Indeed, copyright law best serves the in

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117. 1 NIMMER & NIMMER, *supra* note 36, § 6.07, at 6–23.

118. *Erickson*, 13 F.3d at 1070.

119. Congress authorized the Register of Copyright to issue regulations on copyright law. *See* GORMAN & GORMAN, *supra* note 35, at 382.

120. *See Erickson*, 13 F.3d at 1065; Childress v. Taylor, 945 F.2d 500, 507 (2d Cir. 1991); M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1493 (11th Cir. 1990); S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1989); Cabrera v. Teatro Del Sesenta, Inc., 914 F. Supp. 743, 764 (P.R. 1995); Ashton-Tate Corp. v. Ross, 728 F. Supp. 597, 601 (N.D. Cal. 1989); Kenbrooke Fabrics, Inc. v. Material Things, 223 U.S.P.Q. (BNA) 1039, 1044–45 (S.D.N.Y. 1984); Meltzer v. Zoller, 520 F. Supp. 847, 857 (D.N.J. 1981); *see also Hearings*, *supra* note 113, at 210–11. However, textual support for Goldstein's approach is lacking because the Copyright Act does not mention that each contribution to a joint work must be copyrightable. *Childress v. Taylor*, 945 F.2d at 506. Further, the Act's requirement of an "author" does not necessarily require copyrightable contributions; it only requires that the work originate from the author as opposed to being copied from another source. *Id.* at 507.

121. *Childress*, 945 F.2d at 507.

122. *Id.*

123. *Id.*

124. *Id.*

terest of creativity when it "carefully draws the bounds of 'joint authorship' so as to protect the legitimate claims of both sole authors and co-authors."[125]

B. The Childress Test

1. Examining the *Childress* Test

a. The Facts of *Childress*

Courts have ruled that not every individual who contributes to the creative process should be accorded joint authorship status. In *Childress v. Taylor*,[126] actress Clarice Taylor developed an idea for a play and hired playwright Alice Childress to write it.[127] Taylor's contribution consisted of assembling research materials, interviewing people upon whom the play's characters were based, incorporating jokes from the research material into the play, and recommending that certain scenes and characters be included.[128] The Second Circuit in *Childress* developed a two-pronged test to determine whether Taylor was a joint author of the resulting play.[129]

The test, subsequently adopted in other jurisdictions,[130] requires that each putative joint author: (1) make an independently copyrightable contribution, and (2) regard each other as joint authors at the time the work was created.[131] Because Taylor merely offered helpful advice and did not contribute independently copyrightable material, the court found that she failed to meet the "independence" prong of the court's test.[132]

With respect to the second component, the "mutual intent" prong, the court stated that Childress and Taylor's subsequent conduct did not support the contention that they regarded each other as joint authors at the time the play was created.[133] In particular, the *Childress* court focused on the fact that Childress rejected a joint ownership deal, which Taylor's agent negoti-

125. *Id.* at 504.

126. 945 F.2d 500 (2d Cir. 1991).

127. *Id.* at 501–02.

128. *Id.* at 502.

129. *Id.* at 506–07.

130. *See, e.g.*, Thomson v. Larson, 147 F.3d 195, 196 (2d Cir. 1998); Erickson v. Trinity Theater, Inc., 13 F.3d 1061, 1068 (7th Cir. 1994); Cabrera v. Teatro Del Sesenta, Inc., 914 F. Supp. 743, 764 (P.R. 1995); Clogston v. American Acad. of Orthopedic Surgeons, 930 F. Supp. 1156, 1158 (W.D. Tex. 1996).

131. *Thomson*, 147 F.3d at 200; *Erickson*, 13 F.3d at 1061, 1067–68, 1070–71; *Childress*, 945 F.2d at 507–08.

132. *Childress*, 945 F.2d at 509.

133. *Id.*

ated while the play was being written.[134] Taylor did not object to Childress' rejection of the joint ownership deal, further indicating to the court that the artists did not regard each other as joint authors.[135]

b. Application of the *Childress* Test

The independence prong of the *Childress* test incorporates the Goldstein approach by mandating that each author contribute a copyrightable original work of authorship to the final project.[136] However, the mutual intent prong is controversial because the legislative history of the 1976 Act requires only intent and knowledge for the contribution to be merged into a unitary whole.[137] In comparison, the *Childress* court heightened the scrutiny by examining whether "each participant intended that all would be identified as co-authors . . . [or] . . . how the parties implicitly regarded their undertaking."[138] Although not explicitly supported by the 1976 Act's legislative history, the mutual intent prong created by the *Childress* court furthers Congress' intent.[139] To merely require an intent and knowledge that one's contribution be merged into a whole extends joint authorship status to many people who were not likely to be considered joint authors by Congress.[140] To illustrate, a writer frequently works with an editor who makes numerous revisions to the writer's first draft; those revisions constitute copyrightable expressions.[141] Although the writer and editor both intend for their contributions to be merged into inseparable parts of a whole, neither would

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134. *Id.*

135. *Id.*

136. *Id.* at 506; *see* GOLDSTEIN, *supra* note 107, § 4.2.1.2.; *see also supra* Part III.A.2.

137. Erickson v. Trinity Theater, Inc., 13 F.3d 1061, 1068 (7th Cir. 1994).

138. *Childress*, 945 F.2d at 508.

139. *Id.* at 507. Several jurisdictions support the *Childress* court's interpretation of the statutory language. *See, e.g.*, *Erickson*, 13 F.3d at 1070; Papa's-June Music, Inc. v. McLean, 921 F. Supp. 1154, 1157 (S.D.N.Y. 1996); Design Option v. Bellepoint, Inc., 940 F. Supp. 86, 90 (S.D.N.Y. 1996); Fred Riley Home Bldg. Corp. v. Cosgrove, 883 F. Supp. 1478, 1482 (Kan. 1995); Cabrera v. Teatro Del Sesenta, Inc., 914 F. Supp. 743, 767 (P.R. 1995); Muller v. Walt Disney Prods., 871 F. Supp. 678, 684 (S.D.N.Y. 1994); Aymes v. Bonelli, No. 85 Civ. 2228 (JSM), 1994 WL 97026 at *1 (S.D.N.Y. Mar. 24, 1994). Some scholars argue that the Supreme Court decision in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), merely requires an artist's intent to merge their individual part into a unitary whole. *See* Thomson v. Larson, 147 F.3d 195, 201 n.17 (2d Cir. 1998). However, the Supreme Court remanded the case on the issue of joint authorship and did not discuss it further. *Community for Creative Non Violence*, 490 U.S. 730–753. Thus, *Childress* is not at odds with *Community for Creative Non-Violence*.

140. *Childress*, 945 F.2d at 507.

141. *Id.*

identify the editor as joint author, nor would they expect the editor to receive an equal, undivided interest in the article.[142]

Consequently, in order to obtain joint authorship status, artists must regard each other as joint authors, whether or not they fully understand the legal consequences of that relationship.[143] In the absence of a contractual agreement concerning authorship, the *Childress* test requires courts to look at factors such as billing or credit to determine whether the artists regarded each other as joint authors.[144] Credit can be given on playbills, record jackets, other publicity material,[145] and past drafts of the pertinent work.[146]

A court should also consider the collaborator's conduct after the work is finished, which can be probative of the collaborator's state of mind at the time the work was created.[147] Furthermore, evidence of an author working alone with the permission of other putative authors indicates that the artists did not regard each other as co-authors.[148] The quality and quantity of a collaborator's contribution is another factor in determining sole authorship.[149] Finally, other factors include the written agreements between the collaborators, whether a collaborator retains the authority to approve changes in the work, and whether a collaborator enters into agreements regarding the work without being required to obtain the consent of the others.[150]

2. The Progeny of *Childress*

In *Erickson v. Trinity Theater, Inc.*,[151] the Seventh Circuit found that company actors who assisted in developing a playwright's three plays were not joint authors.[152] For the first play, the playwright created the stories on which the play was based.[153] Each actor then improvised their assigned

142. *Id.*

143. *Id.* at 508.

144. *Id.*

145. Cabrera v. Teatro Del Sesenta, Inc., 914 F. Supp. 743, 756 (P.R. 1995).

146. *See* Thomson v. Larson, 147 F.3d 195, 203 (2d Cir. 1998).

147. *See Childress*, 945 F.2d at 509. For example, the court found that Taylor's acquiescence over the playwright's rejection of the joint ownership deal was probative of Taylor's prior state of mind. *Id.*

148. *See Cabrera*, 914 F. Supp. at 756. Upon witnessing that the author worked alone on the script, the other artists who claimed joint authorship did not intervene and allowed the playwright to continue working without them. *Id.*

149. *See Thomson*, 147 F.3d at 202.

150. *Id.* at 202–203, 204.

151. 13 F.3d 1061 (7th Cir. 1994).

152. *Id.* at 1062.

153. *Id.* at 1072.

story to supply ideas for the dialogue.[154] For the second play, an actor suggested including a passage from William Shakespeare's *Macbeth*.[155] For the third play, the actors developed a scene by improvisation during rehearsal.[156] The playwright then compiled her rehearsal notes to complete the script.[157]

The Seventh Circuit ruled that the company actors failed to contribute independently copyrightable works to any of the three plays, because ideas and refinements standing alone are not copyrightable.[158] Arguably, however, the actors satisfied the independence prong of the *Childress* test by contributing original material developed from their own thought processes.[159] Moreover, those contributions were "fixed" under the actors' consent by the playwright who incorporated their comments into the final script.[160]

The *Erickson* court persuasively concluded that because the playwright and the company did not regard each other as co-authors when the plays were created, the company failed to meet the mutual intent prong of the *Childress* test.[161] The court found that the playwright retained final control over the creative process, because she decided what to incorporate into the finished scripts.[162] Additionally, the actors yielded to her final decision-making authority.[163] Hence, the court did not find joint authorship in any of the three situations.[164]

Similarly, in *Cabrera v. Teatro Del Sesenta, Inc.*,[165] the court did not find the members of a non-profit theater company to be joint authors of a playwright's project.[166] The company consisted of actors, directors, writers, and executive producers.[167] They discussed line by line what the playwright wrote and then rewrote portions of the play.[168] Afterward, the playwright incorporated the collaborative revisions into the play's final draft.[169]

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154. *See id.* at 1064.

155. *Id.* at 1063.

156. *Id.* at 1064. *See* note 26 and accompanying text (explaining the improvisation process); *see also* BROCKETT, *supra* note 27, at 147–48.

157. Erickson v. Trinity Theater, Inc., 13 F.3d 1061, 1064 (7th Cir. 1994).

158. *Id.* at 1072.

159. *See id.* at 1063–65.

160. *See id.*; *see* Copyright Act of 1976, 17 U.S.C. § 102(a) (1994) (stating when a work is "fixed").

161. *Erickson*, 13 F.3d. at 1072.

162. *Id.*

163. *Id.*

164. *Id.* at 1073.

165. 914 F. Supp. 743 (P.R. 1995).

166. *Id.*

167. *See id.* at 745.

168. *Id.* at 753.

169. *Id.* at 754.

In reaching its conclusion, the court narrowly interpreted what constitutes a copyrightable work.[170] Despite the fact that the company's work was fixed into the play's final draft, the court still found that the contributions were mere ideas.[171] Because the members of the company could not specifically identify their contributions in the play's final version, the court did not find their contributions to be copyrightable.[172] However, the *Cabrera* court's interpretation of the 1976 Act's requirement of a fixed original work of authorship seems narrower than what Congress intended. According to prior case law interpreting the 1976 Act, a potential joint author only has to prove that their contribution possessed a modicum of creativity and was not copied from someone else.[173] Requiring an artist to distinguish their work from another's in a well-integrated play questionably heightens the factual scrutiny as to whether something is copyrightable, and thereby satisfies the independence prong of the *Childress* test.

The *Cabrera* court found that the company also failed to prove that all the collaborators regarded each other as co-authors.[174] For example, the theater provided the playwright with a place where she could work alone.[175] In addition, the playwright rewrote portions of the script without objection from the company.[176] Furthermore, the members of the company were paid as actors and directors, not as co-authors.[177] Finally, the court considered the playbill, which referred to the members merely as "script consultants."[178] Ultimately, the court did not find joint authorship.[179]

Focusing on *Childress* and its progeny is instructive because they reveal that recent joint authorship suits arise in the context of new play development, which is a highly collaborative process. Further, compared to the 1976 Act, the *Erickson* and *Cabrera* courts used a stricter approach towards identifying a copyrightable contribution, making it more difficult for collaborators to claim joint authorship. Collectively, these cases indicate that the mutual intent prong is necessarily analyzed on a fact intensive, case-by-case basis.

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170. *Id.* at 765.

171. Cabrera v. Teatro Del Sesenta, Inc., 914 F. Supp 743, 766 (P.R. 1995); *see* Copyright Act of 1976, 17 U.S.C. § 102(b) (1994); H.R. REP. NO. 94-1476, at 56-57 (1976) (explaining that ideas are not copyrightable); *see also supra* note 102 and accompanying text.

172. *Cabrera*, 914 F. Supp. at 756.

173. *See supra* note 75 and accompanying text (explaining the definition of "author").

174. *Cabrera*, 914 F. Supp. at 756.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *See id.* at 766–68.

3. A Correct Application of *Childress*: *Thomson v. Larson*

a. The Independence Prong

The Second Circuit appropriately ruled in favor of the late playwright, Jonathan Larson, by denying joint authorship of *Rent* to the dramaturg, Lynn Thomson.[180] Applying the independence prong of the *Childress* test, the court concluded that Thomson contributed copyrightable material.[181] Thomson and Larson revised the script together at Larson's apartment.[182] Thomson developed the plot and theme, contributed to the story, developed some characters, and re-wrote a significant portion of the dialogue and lyrics.[183] In the meantime, Larson occasionally inserted verbatim some of Thomson's notes into his computer.[184] Experts evaluated Thomson and Larson's collaborated version as a "radical transformation of the show."[185] Although Larson typed in the changes, the material was fixed into Larson's computer with Thomson's consent.[186] Thomson clearly contributed original work. As a result, the court concluded that the demands of the independence prong were met.

b. The Mutual Intent Prong

i. Billing and Credit

Although the court found that the independence prong was met, upon properly applying the mutual intent prong, the court found that Larson and Thomson did not have the requisite intent that *Rent* be a joint work at the time of its creation.[187] The court found that although billing or credit is not decisive, it is a "window [into] the mind of the party who is responsible for giving the billing or the credit" and "a writer's attribution of the work to herself alone is 'persuasive proof . . . that she intended [the work] to repre-

180. Thomson v. Larson, 147 F.3d 195, 195 (2d Cir. 1998).

181. *Id.* at 200–01.

182. *Id.* at 197.

183. *Id.* at 198 n.10.

184. *Id.* at 197, 201 n.14, *citing* Thomson v. Larson, 96 Civ. 8876 (S.D.N.Y. 1997) (finding that Thomson contributed between zero and nine percent of the material) (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

185. *Id.* at 198.

186. *Id.*

187. *Id.* at 204. Because Thomson testified as to her intent, much of the court's analysis focused on whether Larson intended to regard Thomson as a joint author, because he died in January, 1996, nine months before the suit was filed. *Id.* at 198.

sent her own individual authorship.'"[188] In the *Thomson* case, all drafts of the script's title page bore the credit, "'Rent', by Jonathan Larson" to which Thomson did not object.[189] Thomson also did not object to Larson's listing himself as "author/composer" in the off-Broadway production's playbill.[190] In the same playbill, Thomson was listed as "dramaturg."[191] Additionally, Thomson acknowledged Larson as the "composer and librettist of 'Rent'" in a profile of Larson that she wrote for another theater publication.[192] Thomson also conceded that she never sought equal billing with Larson.[193]

ii. Written Agreements

In addition to maintaining exclusive credit for the authorship of the play, Larson also designated himself as the sole author of the new revision in all contracts with NYTW.[194] The fact that Larson entered into a contract without Thomson's consent indicates that he did not regard her as a joint author.[195] Moreover, Larson agreed to an option deal specifying that royalty payments were to flow to him as the "author."[196] This agreement did not mention Thomson.[197]

Prior to the collaboration, Thomson signed a contract with NYTW defining her role as dramaturg[198] and setting her fee at $2,000.[199] Thomson also signed a dramaturgical contract with *Rent*'s Broadway producers after she and Larson created the show's final draft.[200] The agreement provided that Thomson be billed as "dramaturg" on the staff credit page.[201] At no point during the negotiations with either NYTW or the Broadway producers

188. Thomson v. Larson, 147 F.3d 195, 203 (2d Cir. 1998) (citing Weissman v. Freeman, 868 F.2d 1313, 1320 (2d Cir. 1989)).

189. *Id.*

190. *Id.* at 204.

191. *Id.* at 203.

192. Blumenthal, *supra* note 10, at B2.

193. *Thomson*, 147 F.3d at 203. Thomson argued that she did not need equal billing to be deemed a statutory co-author, but this did not preclude the court from finding that there was no mutual intent. *Id.*

194. *Id.* at 204.

195. *Id.*

196. *Id.* at n.26.

197. *Id.*

198. *Id.* at 197. Thomson's responsibilities were to "include, but not be limited to: [p]roviding dramaturgical assistance and research to the playwright and director." *Id.*

199. Thomson v. Larson, 147 F.3d 195, 197 (2d Cir. 1998).

200. *Id.*

201. *See id.*

did Thomson claim to be *Rent*'s co-author.[202] As a result, Thomson failed to meet the requirements of the mutual intent prong.

iii. Additional Manifestations of Intent

The court also considered additional facts in coming to the conclusion that Larson and Thomson did not consider each other as joint authors of *Rent*. For instance, the agreement between Larson and NYTW gave Larson the discretion to make final changes to the *Rent* script.[203] Furthermore, before Thomson was hired, NYTW's artistic director recommended that Larson refine the script with a bookwriter's assistance.[204] Larson steadfastly rejected this recommendation because he wanted to make *Rent* "entirely his own project."[205] These facts persuaded the court to determine that Larson never intended to have a joint authorship relationship with anyone.[206]

IV. COPYRIGHT LAW AFFORDS DRAMATURGS INADEQUATE PROTECTION

A. Why Dramaturgs Cannot Pass the Childress Test

1. The Independence Prong

Dramaturgs will generally not be accorded joint authorship because they cannot satisfy the two-pronged test established by the *Childress* court. In particular, most dramaturgs cannot fulfill the requirement that their contributions be independently copyrightable. Many dramaturgs assist playwrights by asking the right questions, not by proposing or writing solutions themselves.[207] For example, instead of rewriting or suggesting certain lines to strengthen a character, a dramaturg will encourage the playwright to develop a more specific or sympathetic character.[208] The dramaturg is the author of this suggestion because it originates from them. However, this type of contribution does not meet the statutory requirement that it be fixed

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202. *See id.*

203. *Id.* at 203.

204. *Id.* at 204.

205. Thomson v. Larson, 147 F.3d 195, 204 (2d Cir. 1998).

206. *Id.*

207. *See* Evans, *supra* note 6, at 61, 63; William Grimes, *On Stage, and Off*, N.Y. TIMES, Nov. 29, 1996, at C2; Pressley, *supra* note 16, at D2.

208. Telephone Interview with Mandy Mishelle, *supra* note 14. *See generally* Evans, *supra* note 6, at 61 (quoting one of the lead actors in *Rent* who stated that dramaturgs "ask the questions that make the writer deepen the work").

in a tangible medium of expression.[209] Accordingly, the independence prong is not satisfied.

However, some dramaturgs actually make written contributions.[210] In *Rent*, for instance, Thomson rewrote some of the dialogue and lyrics.[211] Unlike the previous example, such a contribution meets the requirements of the independence prong.[212] The dramaturg is the author of the revised lyrics because they created it. Moreover, a dramaturg who dictates their proposals to a playwright, who then types them into a computer, will still be considered to have fixed the work into a tangible medium because a work may be fixed by or under the authority of the author.[213] Consequently, a dramaturg under these circumstances satisfies the demands of the independence prong.

2. The Defects of the Mutual Intent Prong

By examining whether contributors to a work regarded each other as joint authors, the second prong of the *Childress* test utilizes a stricter inquiry than the 1976 Act intended.[214] However, this stringent analysis furthers Congress' intent by excluding those works that Congress did not intend to protect.[215] Although Congressional intent is satisfied, this does not suggest that the mutual intent prong is without flaws. Rather, proving a contributor's state of mind begets a subjective and inexact analysis.[216] In fact, "*Childress* and its progeny . . . do not explicitly define the nature of necessary intent" that joint authors must possess to win their claims.[217] Unfortunately, the *Childress* analysis essentially turns on the contributor's own words or professed state of mind.

In defense of the *Childress* test, the Second Circuit in *Thomson* held that the mutual intent standard is not strictly subjective.[218] The Second Cir-

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209. *See* Copyright Act of 1976, 17 U.S.C. § 102(a) (1994); *see also supra* note 102 and accompanying text (defining "fixed").

210. Thomson v. Larson, 147 F.3d 195, 197 n.5 (2d Cir. 1998).

211. *Id.* at 197 n.10.

212. *But see* Cabrera v. Teatro Del Sesenta, Inc., 914 F. Supp. 743 (P.R. 1995). The *Cabrera* court took a narrow approach as to what constituted an expression as opposed to an idea. *See supra* Part III.B.2.

213. 17 U.S.C. § 102(a).

214. *See supra* Part III.B.1.b.

215. *See supra* Part III.B.1.b.

216. *Thomson*, 147 F.3d at 201; *see also* Thomson v. Larson, No. 96 Civ. 8876, 615, 738 (S.D.N.Y. 1997) (stating that the court acknowledged the plaintiff attorney's frustration resulting from the circularity of the mutual intent prong) (on file with *Loyola of Los Angeles Entertainment Law Journal*).

217. *Thomson*, 147 F.3d at 201.

218. *Id.*

cuit found that the test requires a "more nuanced inquiry into factual indicia of ownership and authorship, such as how a collaborator regarded herself in relation to the work in terms of billing and credit, decisionmaking, the right to enter into contracts."[219] Granted, the *Childress* court recognized that the numerous contexts giving rise to joint authorship issues prevented it from crafting a specific rule with respect to the second prong.[220] However, in doing so, the *Childress* test sacrifices consistency and predictability because many of the factors used to analyze whether the contributors regarded each other as joint authors can only be resolved on a case-by-case basis.

Additionally, the mutual intent prong is circular. In order to win her case, a putative joint author needs to prove that the other author regarded her as a co-author.[221] This requirement seems tautological because the existence of a document or conduct indicating both authors' acknowledgment of co-authorship prevents the need for a lawsuit in the first place.[222] In fact, the judge in *Thomson* proffered that he "share[d] a little bit of [the plaintiff attorney's] frustration, because there [was] some degree . . . [of] circularity."[223]

Moreover, given the playwright's status in theater compared to that of a dramaturg, the mutual intent prong is constructed in such a way that a dramaturg will almost always lose their case. Theatrical writers are distinguished from those in other performance media, such as film or television.[224] In particular, a playwright retains ownership of their play and receives income from and exercises control over all of the play's subsequent productions.[225] Thus, absent a contract granting joint authorship, a playwright inevitably will not regard their dramaturg as a joint author.[226] Therefore,

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219. *Id.*

220. *See Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991) (explaining that the application of the *Childress* test was meant to vary according to the facts of each case).

221. *See id.*

222. Alisa Solomon, *Rent Destabilized*, THE VILLAGE VOICE, Aug. 12, 1997, at 83.

223. Thomson v. Larson, No. 96 Civ. 8876, 615, 738 (S.D.N.Y. 1997) (on file with *Loyola of Los Angeles Entertainment Law Journal*).

224. Thomson v. Larson, 147 F.3d 195, 203 n.22 (2d Cir. 1998).

225. Keller, *supra* note 41, at 891. However, because of industry practice, writers in television and film do not retain copyright ownership of their works. *Id.* at 892. Trade practices in the film and television industries require script writers to designate their screenplays as works made-for-hire. *Id.* at 892 n.6 Thus, the producing entity holds the copyright in the work. *Id.*

226. Most dramaturgs work on scripts as employees of the producing theater, and even absent an agreement waiving ownership of copyrights, employees do not have any copyright interest under the work made-for-hire doctrine. *Thomson*, 147 F.3d at 205 (referring to the Brief for Amici Curiae, The National Writers Union and Literary Managers and Dramaturgs of the Americans, Inc., at 4–5). Even if the playwright is not the copyright owner of the material, given the collaborative nature of theater, "any 'contribution' of copyrightable material should be understood as conveying with it to the playwright a non-exclusive license to use the collaborator's material in the

although a dramaturg provides copyrightable work, it will not be considered a joint authorship because it will not satisfy the mutual intent prong of the *Childress* test.

Yet, there are cases in which collaborators were found to be statutory joint authors even though they did not intend to be.[227] These cases rely on an objective indicia of intent, such as determining whether a potential joint work contains inseparable or interdependent parts.[228] This objective test focuses only on the existence of collaboration, and would grant joint authorship status to those who Congress did not intend to receive such a status.[229] Given the especially collaborative nature of theater, this less exacting standard will deem any artist developing a new play, such as an actor or choreographer, a joint author.[230] As such, any playwright would hesitate before asking for feedback on developing their piece.[231] Therefore, although the *Childress* test is flawed, it provides for more equitable results than a completely objective test.

B. Policy Issues

The *Childress* test advances the 1976 Copyright Act's policy goals. The ultimate purpose of copyright legislation is to encourage learning.[232] Its secondary purpose is to reward authors for their contributions to society.[233] These two purposes are closely related. An economic reward provides an

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work, absent some other arrangement in writing." *Id.* (quoting Brief for Amicus Curiae, The Dramatists Guild, Inc., at 30).

227. *See, e.g.*, Community for Creative Non-Violence v. Reid, 490 U.S. 730, 753 (1989) (suggesting in dicta that two self-alleged sole authors might be held to be joint authors if they "prepared the work 'with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole'") (quoting 17 U.S.C § 101); Easter Seal Soc. for Crippled Children & Adults, Inc. v. Playboy Enter., 815 F.2d 323, 337 (5th Cir. 1987) ("Although the parties have refused to acknowledge it . . . it seems clear to us that [the contributions] were interdependent joint works of authorship . . . ."); Strauss v. Hearts Corp., 8 U.S.P.Q.2d 1832, 1837 n.5 (S.D.N.Y. 1988) (finding co-authorship despite one party's denial of having co-authorship intent).

228. In *Community for Creative Non-Violence v. Reid*, one party created the pedestal for a life-sized figure designed by another party. 490 U.S. at 730. Another case involved a magazine article written by two people. *Strauss*, 8 U.S.P.Q.2d at 1837 n.5. *See also supra* notes 76–77 and accompanying text (defining "inseparable" and "interdependent").

229. *See supra* Part III.B.1.b.

230. *See supra* Parts II.D.3, III.A.1, and III.B.1.b.

231. *See supra* Parts II.D.3, III.A.1, and III.B.1.b.

232. *See* GORMAN & GINSBURG, *supra* note 35, at 15.

233. *Id.* at 16.

incentive for authors to create and disseminate their projects.[234] The public thereby benefits by having access to these works.[235]

Even though dramaturgs are not individually rewarded for their contributions through copyright ownership, an appropriate balance exists between the interests of the playwright and public. The playwright creates a play with the dramaturg's assistance, and the public consequently has access to the work.[236] If dramaturgs were joint authors of a play, they would still hold an equal, undivided interest in the play even though their contribution to the play was not as significant as the playwright's.[237] Hence, recognizing the dramaturg as joint author will cause a playwright to avoid asking for assistance because the playwright will fear losing sole authorship of the work.[238] Discouraged from seeking assistance, the playwright will create an inferior work or abandon the project altogether. In turn, the public will not have an opportunity to enjoy the play, and the copyright legislation's primary goal will be hindered.[239]

Furthermore, the *Childress* test is in accord with the Supreme Court's rejection of the "sweat of the brow" doctrine.[240] The policy rationale behind this doctrine focuses on rewarding an author with copyright ownership for their diligent efforts in creating the work.[241] Therefore, although the dramaturg invests substantial energy by assisting the playwright, diligence alone does not justify giving joint ownership of the play to the dramaturg.

Although it promotes the 1976 Act's policy goals, the *Childress* test does not necessarily further the Act's other goals of administrative and judicial efficiency.[242] A test must be clear enough to allow the artists to predict whether their contributions to a work will receive copyright protection.[243] With a well-constructed test, putative joint authors can avoid post-contribution disputes regarding authorship.[244] With such a test, they also know when to protect themselves by contract before the collaboration, if it

234. *See id.*; *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975); Sony Corp of Am. v. Universal City Studios, 464 U.S. 417 (1984).

235. GORMAN & GINSBURG, *supra* note 35, at 15.

236. Telephone Interview with Mandy Mishelle, *supra* note 14.

237. *See* Copyright Act of 1976, 17 U.S.C. § 201 (1994); Erickson v. Trinity Theater, Inc., 13 F.3d 1061, 1068 (7th Cir. 1994).

238. *See supra* Parts II.D.3. and III.A.1.

239. *See supra* Parts II.D.3. and III.A.1.

240. Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353 (1991) (holding that copyright ownership should not be given to the individual devising the white pages of a telephone book consisting of 46,878 listings merely because of the hard work he invested in the project).

241. *Id.*

242. *Erickson*, 13 F.3d at 1069.

243. *Id.*

244. *Id.*

appears that they will not be protected under the Act.[245] Flaws in the application of *Childress'* mutual intent prong, however, fail to provide for these predictable and objective outcomes.[246]

C. *Copyright Law is Impracticably Applied to Theater*

Applying copyright law to theatrical collaboration may lead to unfair results. In *Thomson*, the deciding judge conceded that the "letter of the law does not align completely with what may be just . . . ."[247] Similarly, the *Cabrera* court noted that although the strict application of statutory requirements "may have produced what might be considered an unfair result, . . . [it was] bound to follow . . . the law."[248] In identifying joint authors, copyright law typically requires documented and measurable results, whereas, theatrical collaboration demands an energized and spontaneous exchange between the collaborators.[249] Thus, copyright law may not be equipped to identify a joint author in the context of new play development because of copyright law's rigid requirements.[250]

For instance, copyright law's notion of "fixed" may not be part of an artist's vocabulary.[251] In addition, fixation of a performance may be a foreign concept to performance artists.[252] These artists do not work from a written script and often improvise their work during their actual performance.[253] Performance art also emphasizes audience participation so each show is unique depending on the audience's reaction.[254] Therefore, performance artists cannot fix their movements or spontaneous ideas in any script or

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245. *Id.*

246. *See supra* Part IV.A.2. (analyzing the flaws of the mutual intent prong).

247. Stuart, *supra* note 17, at C16; *see also* Thomson v. Larson, 96 Civ. 8876, 615, 729 (S.D.N.Y. 1997) ("[T]his case is not [about] whether Lynn Thomson made a great contribution to the show . . . [i]t is about whether . . . Lynn Thompson and Jon Larson met the statutory definition . . . of a joint work.") (on file with *Loyola of Los Angeles Entertainment Law Journal*).

248. Cabrera v. Teatro Del Sesenta, Inc., 914 F. Supp. 743, 768 (P.R. 1995).

249. Solomon, *supra* note 222, at 83. Plays are created either from the improvisational acting efforts of a group or the combined individual contributions of the writer, director, dramaturg, costume and lighting designer. *See* BROCKETT, *supra* note 27, at 147–50; *see also* Keller, *supra* note 41, at 908.

250. Some commentators argue that the Copyright Act "discriminates against modern artists because it draws lines using traditional notions of creation . . . ." Lori Petruzzelli, *Copyright Problems in Post-Modern Art*, 5 J. ART. & ENT. LAW 115, 115 (1994).

251. As noted earlier, for an original work of authorship to be copyrightable, it must be fixed in a tangible medium. Copyright Act of 1976, 17 U.S.C. § 102(a) (1994); *see also supra* note 102 and accompanying text (defining "fixed").

252. *See* BROCKETT, *supra* note 27, at 632, 636.

253. *Id.* at 632.

254. *Id.*

other tangible medium.[255] Because they cannot fix their work, it is not copyrightable and will not meet the demands of the independence prong. Undoubtedly, however, these performance artists are indeed authors of their live shows.

Pinpointing time also creates a rift between theater and copyright law. The legislative history behind the 1976 Act emphasizes that the "touchstone . . . is the intention, at the time the writing is done . . . ."[256] Determining when a writing is completed is difficult in the context of theater, especially with new play development situations.[257] NYTW is typical of theaters that have workshops to develop material in an ensemble environment that nurtures free-flowing discussion amongst the participants.[258] Under such circumstances, documenting the exact moment a writing is finished would be difficult, if not impossible, because of the play's organic evolution.[259] Therefore, the mutual intent prong of the *Childress* test places unfair obstacles in a collaborator's path to joint ownership of a work.[260] Consequently, copyright law is not well-suited to the collaborative nature of theater.

D. The Advantages of Applying Contract Law

Due to the inadequacies of copyright law, the Second Circuit recommended that artists protect their collaborative efforts through contracts governing the division of royalties or assignment of copyright ownership.[261] In fact, the 1976 Act itself states that any of the exclusive ownership rights in a copyright may be transferred[262] from the person who obtains the copyright to one who purchases the ability to exercise those rights.[263] Even if a collaborator does not make a copyrightable contribution to a completed work, that collaborator still has the opportunity to share in the profits through a con-

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255. *Id.*

256. H.R. REP. NO. 94-1476, at 120 (1976).

257. *See* Solomon, *supra* note 222, at 83.

258. Telephone Interview with Mandy Mishelle, *supra* note 14.

259. All the joint authorship suits involving plays occurred in the context of new play development in smaller theaters. *See generally* Thomson v. Larson, 147 F.3d 195 (2d Cir. 1998) (involving a non-profit theater that workshopped new plays); Erickson v. Trinity Theater, Inc., 13 F.3d 1061 (7th Cir. 1994) (involving actors who developed the playwright's works in a small ensemble theater company); Childress v. Taylor, 945 F.2d 500 (2nd Cir. 1991) (involving an actress who developed a play with a playwright); Cabrera v. Teatro Del Sesenta, Inc., 914 F. Supp. 743 (P.R. 1995) (involving a non-profit theater company that made changes to a working script by committee).

260. *See supra* Parts IV.A.2 and III.B.1.b.

261. *See Childress*, 945 F.2d at 508; *see also* Copyright Act of 1976, 17 U.S.C. § 201(d)(1) (1994).

262. 17 U.S.C. § 201(d); *see also Erickson*, 13 F.3d at 1071.

263. *Erickson*, 13 F.3d at 1071.

tractual agreement.[264] Such an agreement can assign part of the copyright ownership from the copyright owner to the collaborator or specify that a portion of the royalties flows to the others.[265] A contributor can also contract for rights beyond remuneration, such as acknowledgment for their contribution.[266]

Contract law provides adequate protection for the artist where copyright law fails. With a written contract, a dramaturg can memorialize a clear agreement of joint authorship with the playwright.[267] Organizations such as the Literary Managers and Dramaturgs of America,[268] can assist dramaturgs during contract negotiations by giving them bargaining leverage.[269] Once the putative joint authors make their promises, a valid contract enforceable by a court of law exists.[270] If a contributor does not fulfill a promise, the injured contributor may bring a lawsuit for breach of contract.[271] Determining the merits of such a lawsuit is more feasible than that of a copyright suit, because the basis of a contract suit is the written document that supplies the artists' express rights and obligations.[272]

In contrast, various factors complicate the determination of the merits in a copyright suit. For instance, courts interpret the independence prong of the *Childress* test differently.[273] Some courts have conducted a stricter analysis than the 1976 Act would require, such as requiring an artist to identify their contribution in a completed work to determine whether the contribution is independently copyrightable.[274] The challenge in identifying a copyrightable work is compounded by the difficulty in distinguishing an idea from an expression because only expressions are copyrightable.[275] The

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264. *Id.*

265. *Id.*

266. Beth Freemal, *Theatre, Stage Directions & Copyright Law*, 71 CHI.-KENT L. REV. 1017, 1039 (1996).

267. *Id.* at 1037.

268. This is an organization devoted to dramaturgs' interests. *See* telephone Interview with Mandy Mishelle, *supra* note 14.

269. *Id.*

270. Freemal, *supra* note 266, at 1037; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 17.

271. Freemal, *supra* note 266, at 1037; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 1.

272. Freemal, *supra* note 266, at 1037.

273. *See supra* Part III.B.2.

274. *See supra* Part III.B.2.

275. *See* Copyright Act of 1976, 17 U.S.C. § 102(b) (1994) (explaining that the Act does not protect ideas); *see also* Mason v. Montgomery, 967 F.2d 135, 138 (5th Cir. 1992) (stating that "in some cases, however, it is so difficult to distinguish between an idea and its expression that the two are said to merge.").

shortcomings of the *Childress* test's mutual intent prong further complicates the copyright suit.[276] Specifically, the mutual intent prong does not adequately protect collaborators like dramaturgs because it reinforces the status quo of the playwright's sole authorship status in the world of theater.[277] As a result of these intervening factors, artists will have less control in fashioning their arguments in a copyright suit.

The copyright lawsuit is also more costly than a contract dispute. In a copyright action, there is a greater likelihood that the production itself will be enjoined.[278] Courts issue preliminary injunctions in copyright suits "far more routinely in such cases than in other sorts of disputes."[279] This shifts a significant cost to the viewing public because it can no longer enjoy the work in the event that a court issues such an injunction.

Contract disputes, on the other hand, are less cost prohibitive because collaborative agreements often contain provisions requiring arbitration, which is not as expensive as litigation.[280] Unlike litigation, arbitration does not endanger the public interest because injunctions in this context are not often used.[281] For example, the Dramatist Guild's[282] Basic Production Contract for Plays ("Basic Production Contract") contains a provision that obligates the parties to arbitrate contract disputes.[283] If the collaborators disagree on royalty apportionment, for example, the Dramatist Guild steps in to arbitrate and determine the allocation of interests, as opposed to enjoining the project's production.[284] "The Guild does this to avoid the wasted energy which occurs when co-authors disagree, jeopardizing the continuation and completion of the work."[285] Before any dispute arises, artists typically agree

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276. *See supra* Part IV.A.2.

277. *Id.*

278. *See* GORMAN & GINSBURG, *supra* note 35, at 652.

279. *Id.* at 652; *see generally* Erickson v. Trinity Theater, Inc., 13 F.3d 1061 (7th Cir. 1994) (granting a preliminary injunction temporarily enjoining a play's production); Cabrera v. Teatro Del Sesenta, Inc., 914 F. Supp. 743 (P.R. 1995) (awarding the plaintiff a temporary restraining order against the theater, which the court lifted before opening night, but the defendants agreed to halt the production until the case was resolved).

280. As an alternative to filing a law suit, the arbitration process is less formal and time consuming and thus less expensive than litigation. EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 1261 (4th ed. 1991).

281. *See* Keller, *supra* note 41, at 935.

282. The Dramatist Guild is a professional association of playwrights, librettists, composers, and lyricists. *See* Thomson v. Larson, 147 F.3d 195, 206 (2d Cir. 1998).

283. DRAMATIST GUILD, APPROVED PRODUCTION CONTRACT FOR PLAYS, art. XX, at 37 [hereinafter DG Production Contract] (providing that any "claim, dispute, or controversy arising between Producer and Author . . . shall be submitted to arbitration pursuant to the terms of this Article.") (on file with the *Loyola of Los Angeles Entertainment Law Journal*).

284. *See* Keller, *supra* note 41, at 935.

285. *See id.*

to arbitrate any potential disputes.[286] Realizing that automatic arbitration with an attendant fee will be resorted to, the collaborators have an incentive to come to an agreement on their own.[287]

Another attribute of arbitration suitable to theater is the fact that arbitrators have expertise in the context in which the dispute arises.[288] For instance, the Dramatist Guild provides an expert such as a lyricist or composer to determine the relative contributions and credit.[289] This process can lead to a more efficient result compared to a judge who may not be familiar with the specific collaboration process at hand.[290]

Another strength of contract law is the fact that, unlike copyright law, it can be tailor-made to theater. This characteristic is essential to a collaborative art such as theater. Commercial theaters have standardized the allocation of royalties and rights to authors.[291] The Minimum Basic Production Contract for works produced on Broadway, for instance, provides model provisions for professional theaters in the United States.[292] Moreover, the Dramatist Guild's definition of "author" is more suitable to theater compared to case law's definition.[293] In fact, the Dramatist Guild's definition recognizes those persons who are "involved in the initial stages of a collaborative process . . . ."[294]

In addition, trade usage of particular terms or arrangements are helpful in contract law disputes.[295] In the event of a contract dispute, trade usage can facilitate the interpretation of any ambiguities in the contract.[296] As an illustration, the renowned playwright of *Angels in America*, Tony Kushner, gave fifteen percent of the show's royalties to the two dramaturgs who helped him write the final version.[297] In doing so, Kushner acknowledged

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286. MURPHY & SPEIDEL, *supra* note 280, at 1261.

287. Keller, *supra* note 41, at 935.

288. MURPHY & SPEIDEL, *supra* note 280, at 1263.

289. Keller, *supra* note 41, at 935.

290. *See generally* MURPHY & SPEIDEL, *supra* note 280, at 1263 ("[A]rbitration is a form of consensual, relatively informal, personalized adjudication. . . . The challenge is to obtain particularized justice in an extra-legal adjudicatory process which has potential strengths and weaknesses compared to civil litigation.").

291. Keller, *supra* note 41, at 912; *see also* DG PRODUCTION CONTRACT, *supra* note 283, art. IV, at 5–7.

292. Keller, *supra* note 41, at 912.

293. DG PRODUCTION CONTRACT, *supra* note 283, art. I, at 2.

294. *Id.*

295. RESTATEMENT (SECOND) OF CONTRACTS § 222.

296. *Id.* § 222(3) ("[A] usage of trade in the vocation . . . or a usage of trade which [the parties] know or have reason to know gives meaning to or supplements or qualifies their agreement.").

297. Pressley, *supra* note 18, at D2.

that such assignments are typical in the industry.[298] Thus, even if certain artists do not meet copyright law's requirements for joint authorship, they may still share in the profits of the work through contract law.

As a result of *Thomson v. Larson*, Literary Managers and Dramaturgs of America is busily drafting sample contracts for their members to refer to before the members agree to help develop a project.[299] These sample contracts are important, especially given that the Dramatist Guild's definition of "author," although broad, does not explicitly refer to dramaturgs.[300] One lawyer from Volunteer Lawyers for the Arts[301] urges artists to use guild model contracts and contract law to protect themselves because it is often impossible for artists to afford lawyers, unless they have already achieved financial success.[302]

V. CONCLUSION

To summarize, under the *Childress* test, dramaturgs cannot acquire joint authorship status, because they often do not contribute independently copyrightable material. More importantly, given the exclusive status that playwrights exalt in the theater industry, dramaturgs will have difficulty proving that playwrights intended for them to be joint authors. Compared to copyright law, contract law and collaborative agreements more adequately protect the dramaturg. Copyright law, for instance, measures creation in the traditional sense by focusing on intent at the particular time the writing is done. Copyright law also does not include in its definition of "author," those collaborators who contribute substantial material that is not fixed. Therefore, collaborators need to memorialize credit, authorship, and remuneration in writing beforehand. Signing a collaboration agreement is especially important with new play development where creative relationships are uniquely collaborative.[303] Collaborators may object to these agreements because they

298. *Id.* The author of *Chorus Line* recognized the dancers' contributions by apportioning the royalties. *See* Stuart, *supra* note 17, at C16.

299. Solomon, *supra* note 222, at 83.

300. DG PRODUCTION CONTRACT, *supra* note 283, art. I, at 2 (explaining that "[t]he term 'author' shall include any person who is involved in the initial stages of a collaborative process and who is deserving of billing credit as an Author and whose literary or musical contribution will be an integral part of the [p]lay as presented in subsequent productions by other producers.").

301. This is a non-profit organization dedicated to assisting struggling artists involved in legal disputes. *See* Carol J. Steinberg, *How Not to Need a Lawyer: Written Collaboration Agreements*, BACKSTAGE, Apr. 22, 1994 at 13.

302. *Id.* at 13, 47. There is a presumption that joint owners share equally; such a presumption can be altered by contract. *Id.* at 47. One can also spell out who owns the copyright, what credit would be given, and how disputes will be resolved. *Id.*

303. Telephone Interview with Mandy Mishelle, *supra* note 14.

claim that these agreements stymie the creative, free-flowing discussion essential to developing new works. However, signing a collaborative agreement will better ensure that the curtain will still go up in the unfortunate event that the collaborators resort to copyright law in order to determine where money and ownership status go.

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